

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications)	
and Energy on its own Motion to Implement the)	
Requirements of the Federal Communications)	D.T.E. 03-60
Commission's Triennial Review Order Regarding)	
Switching for Mass Market Customers)	
)	

MOTION TO STRIKE

After finding on a nationwide basis that requesting carriers are impaired without access to unbundled loops and unbundled transport at the dark fiber, DS3 and DS1 levels, the Federal Communications Commission ("FCC") delegated to state commissions "the fact-finding role to determine on a route-specific basis where alternatives to the incumbent LECs' networks exist such that competing carriers are no longer impaired." Triennial Review Order, ¶ 398.¹ The FCC emphasized that when the states conduct their route-specific analysis, state commissions "need only address routes for which there is *relevant evidence in the proceeding* that the route satisfies one of the triggers." Triennial Review Order, ¶¶ 339, 417 (emphasis added). Pursuant to 220 CMR 1.04(5), Broadview Networks, Inc., Choice One Communications of Massachusetts Inc., Focal Communications Corporation of Massachusetts, and XO Massachusetts, Inc. (collectively, the "Loop/Transport Carrier Coalition" or "Coalition"), by their undersigned counsel, move to strike portions of the testimony of John Conroy and John White

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order").*

(“Conroy/White testimony”) submitted by Verizon Massachusetts (“Verizon”)² to the Massachusetts Department of Telecommunications and Energy (“Department”) in this proceeding. As explained below, the Conroy/White testimony fails to present any route-specific evidence that wholesale service is available on the challenged routes, and therefore Verizon has failed to present any “relevant evidence” that the route satisfies the wholesale trigger. Verizon’s generalized assertions of wholesale availability should be stricken from the record.

ARGUMENT

Under the Department’s rules, evidence that is “unduly repetitious or cumulative or such evidence as is not of the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs” shall be excluded from the scope of the proceeding. 220 CMR 1.110(1). In the case at hand, Verizon has been given two opportunities – in its November 14, 2003 Initial Panel Testimony and its December 19, 2003 Supplemental Testimony – to present its evidence challenging the FCC’s findings of impairment. Verizon also has had access to the responses to the Department’s information requests and the responses to discovery requests submitted by other parties in this case. Yet, as explained below, in the case of the wholesale triggers, Verizon has failed to produce any relevant evidence to support its assertion that the carriers make their own facilities available at wholesale on the routes in issue (for transport) or to the customer locations (for loops) identified. Since Verizon has now certified that its case is complete, the Department should strike the Conroy/White testimony insofar as it claims that wholesale facilities are made available.

² Verizon’s November 14, 2003 was supplemented on December 19, 2003. Accordingly, both the November 14 and December 19 testimony will be referred to as “Conroy/White Testimony”, specified by date. Attachment A lists the specific portions of the Conroy/White testimony that should be stricken from the record.

I. VERIZON’S TESTIMONY SHOULD BE STRICKEN TO THE EXTENT THAT IT ASSERTS WHOLESALE FACILITIES ARE MADE AVAILABLE

Verizon has attempted to convince the Department to ignore the FCC requirement that a wholesale transport route or customer location be removed from availability as an unbundled network element (“UNE”) when there are actual alternatives to ILEC services already in use on that route or to that customer location. Verizon is asking the Department to eliminate UNEs on a transport route or at a customer location based on a CLECs mere presence in a given Central Office (“CO”). Verizon has attempted to circumvent the FCC’s rules, which require Verizon to produce evidence on a customer-specific and location-specific basis. Instead, Verizon attempts to rely on a general willingness to wholesale. The Department should reject Verizon’s transparent effort to ignore the tests set forth in the *Triennial Review Order*, and should strike the Conroy/White Testimony accordingly.

Verizon admits that it does not present “particularized, location-specific [or route-specific] evidence” of wholesale availability on any transport route or to any customer location, but instead classifies a carrier as a wholesale provider if the carrier, according to Verizon, has deployed facilities on routes or at locations in Massachusetts.³ Using this structure and ignoring the tests set out by the FCC, Verizon classifies entities as wholesale carriers if any of the following circumstances exist: (1) the carrier “holds itself out as a wholesale provider on its website – and does not limit its representation to particular routes”; (2) the carrier supplies

³ Conroy/White November 14 Testimony at 45; Conroy/White December 19 Testimony at 22-22. Verizon explicitly asks the Department to rely on evidence of a carrier’s “general willingness” to provide wholesale service as a substitute for particularized, location-specific evidence. *Id.* Verizon also does not provide specific evidence as to the capacity levels at which the carrier provides wholesale service, but instead claims that the carrier provides wholesale service on all capacity levels. Conroy/White November 14 Testimony at 40, 46; *see also* Conroy/White December 19 Testimony at 18, 21 (regarding wholesale loops).

transport facilities to Universal Access, Inc.; (3) the carrier “has a CATT arrangement in any of Verizon’s wire centers”; or (4) the carrier is listed in the New Paradigm CLEC Report 2003 as offering “dedicated access transport.”⁴ Similarly, with respect to loops, Verizon classifies a carrier as a wholesale provider if the carrier “holds itself out as a wholesale provider on its websites— and does not limit its representation to particular locations or to exclude loops.”⁵

First and foremost, Verizon’s assertions of wholesale availability should be stricken because the evidence does not comply with the FCC’s requirement of route-specific (or location specific) evidence. Triennial Review Order, ¶¶ 339, 417. The Triennial Review Order requires states to conduct a granular, route-specific analysis of impairment with respect to unbundled loops and unbundled transport. As the FCC explained, it made “affirmative national findings of impairment and non-impairment for transport at the national level, as supported by the record.” Triennial Review Order, ¶ 394. The FCC found, however, that the evidence in the record was not sufficiently detailed for it to identify those specific routes “where carriers likely are not impaired without access to unbundled transport in some particular instances.” *Id.* Therefore, it delegated to the states, “the fact-finding role of *identifying on which routes requesting carriers are not impaired* ... when there is evidence that two or more competing carriers, not affiliated with each other or the incumbent LEC, offer wholesale transport service completing that route.” Triennial Review Order, ¶ 412 (emphasis added).

The purpose of state application of the triggers was to enable the impairment analysis to be conducted at a granular, route-specific level, in order to identify where actual deployment demonstrated that requesting carriers would not be impaired. This fact-finding role

⁴ Conroy/White November 14 Testimony at 44-45.

⁵ Conroy/White December 19 Testimony at 21 (footnote omitted).

requires that the Department receive evidence relating to each specific route that is challenged by a carrier. Here, Verizon has failed to present the granular evidence necessary for the Department to do so. Although Verizon presents route-specific evidence that CLEC-owned facilities exist on an “A to Z” route, nowhere in its testimony does Verizon assert that a carrier, in fact, provides wholesale transport on the route.⁶ On the key question of whether the identified facilities are made “readily available” on the route (*see* Triennial Review Order at ¶ 414 n.1279), Verizon is silent. It asks the Department to infer wholesale availability on all routes based on non-granular assertions that some form of “wholesale” generally is offered. But this evidence, even if credited, would not establish that wholesale service was offered on the particular routes in question. Because Verizon has failed to connect its wholesale evidence with any of the transport routes or customer locations challenged, its testimony on wholesale availability should be stricken as irrelevant.⁷

It is not sufficient for the ILEC challenging the FCC finding to cite to a “general willingness” to wholesale, as Verizon admits that it does. The FCC test avoids reliance on a “general willingness” in favor of actual availability on the route. As the FCC explained in the Triennial Review Order, the competitive wholesale facilities trigger safeguards *against* “counting alternative fiber providers that may offer service, but ... are otherwise unable immediately to provision service along the route” and *avoids* “counting alternative transport

⁶ To be clear, Verizon’s evidence concerning facilities deployment is flawed in its own respect, including by way of illustration, Verizon’s erroneous assumption that two collocations necessarily indicate a transport route. Because the testimony is route-specific, however, CLECs will respond to these assertions in their testimony.

⁷ Among other things, under Verizon’s criteria, the carriers in question could offer wholesale service in another state altogether, but not in Massachusetts, and not on the specific routes challenged by Verizon.

facilities owned by competing carriers not willing to offer capacity to their network on a wholesale basis.” Triennial Review Order, ¶ 414. In short, the test “ensures that transport can readily be obtained from a firm using facilities that are not provided by the incumbent LEC.” Triennial Review Order, ¶ 412. Without route-specific evidence, these purposes cannot be satisfied.

Verizon tries to gloss over this deficiency by arguing that the burden is on CLECs to refute that they offer wholesale service on the routes. But Verizon cannot shift to CLECs its burden of proof to overcome the FCC’s findings of impairment. Moreover, Verizon has failed to provide any evidence of wholesale alternatives on the specific transport routes or to the specific customer locations, despite the availability of relevant information in discovery. The Department’s information requests for CLECs, for example, asked the specified carriers to “[p]rovide a list of all the ILEC wire centers in Massachusetts to which you obtained transport facilities (i.e., any facilities that, directly or indirectly, provide connections to wire centers) from a supplier other than the incumbent LEC (including wholesale providers and non-certificated providers, and the names of such providers” and to “[p]rovide a list of all the ILEC wire centers in Massachusetts to which you offer transport facilities to other carriers, and for each identify the capacity or type of transport you offer (e.g., DS1, DS3, or dark fiber).”⁸ Responses to these questions could have been used to identify specific routes where wholesale arrangements had been made. But Verizon chose to ignore this route-specific evidence, presumably because it severely undermines its efforts to show wholesale availability on any routes. By way of illustration, Verizon’s November 14 route list identifies XO as a wholesale provider on

⁸ See October 9, 2003 Information Requests of the Department of Telecommunications and Energy, Transport 1-2 and 1-4.

BEGIN PROPRIETARY ***END PROPRIETARY*** routes. XO's response to the Department's question 2 and 4, however, ***BEGIN PROPRIETARY***

***END

PROPRIETARY*** By eschewing route-specific information, Verizon has substantially inflated the number of transport routes that it challenges.

Second, Verizon's "general willingness" evidence fails even to make a *prima facie* case of wholesale availability as defined by the triggers. Two of the enumerated transport criteria – "holding oneself out" as a wholesale provider and being listed in the New Paradigm CLEC Report 2003 – offer no evidence that the carrier uses its own facilities to provision transport. Even if the carrier offered service at wholesale (which Verizon's evidence does not show), the carrier satisfying these criteria could be reselling special access services of the ILEC. With respect to wholesaling based on the provision of facilities to Universal Access, Verizon offers no evidence that the facilities alleged to be provided to Universal Access terminate in a collocation arrangement at each end of the transport route, and thus are even "transport" as defined in the trigger. Moreover, Verizon does not allege that the wholesale carriers make any of the transport routes identified available to other carriers through Universal Access. As a result, even if some facilities are made available to Universal Access, those facilities are not relevant to any of the routes (or customer locations) that Verizon places in issue.

Finally, Verizon's assertion of wholesale availability based on CATT arrangements is a sleight of hand. Verizon classifies the entity as a wholesale provider if it "has

a CATT arrangement in *any* of Verizon's wire centers.”⁹ Tellingly, putting aside the question whether a CATT arrangement qualifies as collocation within the meaning of the triggers, Verizon did not require that a CATT arrangement be in place on even one end of the transport route that it identifies as a wholesale route, let alone on both ends, as the FCC's definition of a route requires. Indeed, a carrier with a single CATT arrangement in an unrelated central office could be classified as a wholesale provider on scores (or hundreds) of transport routes, even if it purchases transport from Verizon at each of the central offices on the routes. As a result, Verizon's CATT criterion does not identify wholesale availability on any routes.

In sum, Verizon's evidence of wholesale availability simply is immaterial to the granular analysis required by the FCC's triggers. Because Verizon has been given every opportunity to develop and present relevant evidence that wholesale facilities are made available on the routes it challenges, and Verizon has failed to do so, the Department should strike those portions of Verizon's testimony relating to wholesale facilities. CLECs should not be made to refute, on a “particularized, location-specific basis,” evidence that does not address those locations in the first place.

II. IN THE ALTERNATIVE, EVIDENCE OF DS1 WHOLESALE SHOULD BE STRICKEN

Even if Verizon's showing with respect to wholesale availability in general is not stricken, the Department should nevertheless strike all claims that DS1 loops or transport are available on a wholesale basis. Verizon assumes that all wholesale providers will offer DS1 transport, despite the FCC's finding that “DS1 transport is not generally made available on a

⁹ Conroy/White November 14 Testimony at 44 (emphasis added).

wholesale basis.”¹⁰ Given this finding by the FCC, at a minimum, Verizon must submit evidence that the wholesale carriers (assuming, *arguendo*, that they are properly classified as wholesalers) offer transport and loops to other carriers at a DS1 level. Evidence that carriers offer service “at speeds up to OC 48”¹¹ does not identify whether that carrier is willing to offer it at a DS1 level. Because Verizon’s testimony simply assumes this without any support, its assertions regarding the availability of DS1 wholesale should be stricken.

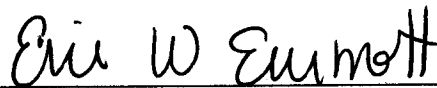
¹⁰ *TRO*, ¶ 392; *see Id.* at n. 1216 (noting the “very limited evidence of carriers using alternative DS1 transport”).

¹¹ Conroy/White November 14 Testimony at 46.

CONCLUSION

For the reasons explained above, Verizon fails to present any relevant evidence on which the Department could rely to conclude that competitive facilities are made available at wholesale on any of the transport routes or to any of the customer locations identified by Verizon in its testimony. Accordingly, the Department should strike those portions of Verizon's testimony that relate to wholesale facilities. At a minimum, the Department should strike all assertions that DS1 facilities are made available on a wholesale basis, because the bare assertion conflicts with the FCC's findings based on a national record.

Respectfully submitted,



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Attachment A
Portions of Verizon Testimony to be Stricken

Conroy/White November 14, 2003 Direct Testimony

Page	Lines
33	Table, Column 2 (all) and Column 3 (references to wholesale providers only)
35	14-23
36	1-18
43	20-22
44	2-22
45	1-21
46	1-14
Attachment 6	Sections B, B.1, C (wholesale provider column only) and C.1 (wholesale provider column only)
Attachment 8	Entire document

Conroy/White December 19, 2003 Supplemental Direct Testimony

Page	Lines
5	13-19 (beginning with "or obtained dedicated transport)
6	2-4 ("or two or more wholesale" ending at "MA wire center"), 14-18 (beginning with "Additionally, in response to request DTE 1-2" and ending with "wholesale transport provider(s)"), 20 (beginning with "also indicated")
7	1-18
8	1-22
9	1-7, 14-17 (beginning with "Verizon MA's evidence also shows")
10	5-12, 14-19 (references to wholesale routes only)
11	1, 10-16. 18-22 (references to wholesale routes only)
12	1
17	2-6 (beginning with "Similarly"), 12 (through "wholesale trigger"), 15-16 (beginning with "wholesale trigger" through "both triggers")
20	20-27
21	1-19
22	1-2
Attachment 3	Sections C, D (wholesale references only), F and G (wholesale references only)
Attachment 4	Columns labeled "DS-3 Wholesale Trigger" and "DS-1 Wholesale Trigger"